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No. 87-2058

In The
Supreme Court of the United States
October Term, 1987

CORNHUSKER CHRISTIAN CHILDREN'S HOME, INC., A Nebraska Nonprofit Corporation,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, *et al.*,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I.

Whether Cornhusker Christian Children's Home, Inc., has standing to claim a denial of parental rights.

II.

Whether the Nebraska Supreme Court properly denied Cornhusker's motion to certify a federal question given that the constitutional issue was not addressed by the district court and was not, therefore, assigned as error by the appealing party.

III.

Whether the opinion of the Nebraska Supreme Court indicates clearly and expressly that it rests on bona fide separate state grounds.

PARTIES TO THE OPINION BELOW

Cornhusker Christian Children's Home, Inc., appellant herein, and the State of Nebraska Department of Social Services, appellee herein, are parties to the opinion of the Nebraska Supreme Court. That case is reported at 227 Neb. 94, 416 N.W.2d 551 (1987). Note that Cornhusker is the sole appellant. Other appellees herein are the Director of the Nebraska Department of Social Services, Kermit R. McMurry, formerly Gina C. Dunning; the Nebraska Attorney General, Robert A. Spire, formerly Paul A. Douglas; Governor of the State of Nebraska, Kay Orr, formerly Robert C. Kerry; and the State of Nebraska.

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JURISDICTIONAL STATEMENT

The Nebraska Department of Social Services of the State of Nebraska ("DSS"), Appellee, agrees that the Nebraska Supreme Court upheld the regulation on state law grounds. However, it is necessary to comment on one portion of that summary made by Cornhusker Christian Children's Home, Inc., ("Cornhusker"), Appellant. The statement ". . . that the regulation violated the liberty interest of the Cornhusker and of parents with children placed at Cornhusker, . . ." does not, in context, fully comport with the factual scenario for the reason that the parents of the children were at no time a party to the action.

JURISDICTION

Appellant has generally outlined the basis of the controversy, but DSS disagrees on the issue as to whether the decision presents a federal question to be reviewed by this Court, and, therefore moves, to dismiss the appeal under Rule 16(b) of Supreme Court Rules in that the judgment does not create a substantial federal question and rests on an adequate non-federal basis. *Michigan v. Long,* 463 U.S. 1032 (1983). Consequently, a dismissal for want of jurisdiction for failure to raise a substantial federal question is a dismissal on the merits. *Cross v. Bruning,* 413 F.2d 678, *cert. denied,* 396 U.S. 970, *rehearing denied,* 396 U.S. 1063 (1969). Department of Social Services also moves for dismissal under 16(d) of the Supreme Court Rules in that Cornhusker does not have standing to sue

in the United States Supreme Court. *See, e.g., Don't Bankrupt Washington Committee v. Continental Bank,* 460 U.S. 1077 (1983). Cornhusker seeks to rest its claim on the legal rights or interests of third parties and is unable to show actual or threatened injury apart from asserting third party interests. *Valley Forge College v. American United,* 454 U.S. 464 (1982).

It should be noted that the decision in the courts below was made on state law grounds. In the trial court (The District Court for Lancaster County Nebraska) where the Cornhusker first prevailed, the decision to invalidate the regulation (and thus permit corporal punishment) was based on statutory law. In other words the trial court which decided favorably for Cornhusker did not find it necessary to address the constitutional question. When the Supreme Court of Nebraska reviewed the record, the arguments, and the lower court opinion, it reversed the trial court decision which was made on state law grounds.

The trial court's rationale for invalidating the regulations was based on several considerations, none of which were based on a fundamental constitutional question. The trial court first stated that the Nebraska Legislature specifically permitted corporal punishment citing Neb.Rev. Stat. §§ 28-1413, and 43-708. It then reasoned from there that any attempt to prohibit or limit corporal punishment was a violation of statutory authority. From that threshold the trial court concluded that the Nebraska Legislature had not authorized the abolishment of reasonable corporal punishment. The trial Court then stated that since the Department did permit corporal punishment (spank-

ing) in family day care homes, the prohibiting of it in child caring agencies was arbitrary and capricious. This was in spite of the fact the record shows that the distinction was reasonable in that children in family day care centers go home each night with the parents having ongoing rapport with the staff of the home and regular opportunity to talk to and inspect their children. On the other hand, the parents of children in child caring agencies may not have an opportunity to see or visit with their children for several months.

The trial court stated that house parents and the superintendent stand *in loco parentis* to children placed in the home, and then reasoned that since a parent can use reasonable corporal punishment that employees of the home can do so as well. Cornhusker argued and the trial court stated that the position of parents and those standing *in loco parentis* are identical. In reality they are not the same, and both are subject to state intervention. A parent is not free to use corporal punishment to a level of abuse. A home or agency such as Cornhusker, as a condition of licensing, can be required to follow a regulation prohibiting corporal punishment.

The trial court also concluded that the public policy of the State of Nebraska is not to prohibit reasonable corporal punishment and that the Legislature has not authorized its abolishment. DSS fails to see how this statute can be read to restrict the Department from promulgating regulations prohibiting corporal punishment.

Both of these statements by the trial court ignored the fact that the Legislature had spoken on the subject in Neb.Rev.Stat. §§ 71-1903 to 71-1915 requiring the Depart-

ment of Social Services to promulgate rules and regulations for the protection of children in the licensure of homes. The regulation or prohibition of corporal punishment was clearly within the ambit of the statute to protect children. However, the trial court held that Regulation 6-005.26K was void since it exceeds the authority and power of the Department under State Law. This decision was reversed by the Supreme Court of Nebraska which effectively reinstated the prohibition against corporal punishment.

It should be emphasized that the trial court held for Cornhusker on the basis of statutory authority. The trial court in its opinion did not address a constitutional issue such as whether there was a violation of the rights of the home or the parents under the Fifth or the Fourteenth Amendments. The issue before the trial court was the validity of the regulation as it applied to the home as a condition of licensure. The District Court did not address the issue of possible intrusion on the parents' rights. Neither did the Nebraska Supreme Court and properly so.

The Supreme Court disagreed with the trial court, holding there was authority for the regulation under state law and held that it was valid. The fact that Cornhusker argued that the rights of the parents were in tandem with licensure requirements for home is not sufficient to create a substantial federal question. Even though the Supreme Court of Nebraska reversed the trial court, it does not mean that Cornhusker should be able to "bootstrap" a peripheral issue, to which Cornhusker did not have standing to raise, into a substantial federal question.

Moreover, Cornhusker's attempt to convert the rights or interests of parents into the claim raised on appeal is

not sufficient for standing. Regulation 6-005.26K does not injure Cornhusker's ability to control those children under its supervision since Cornhusker is relatively free to utilize most noncorporal forms of punishment. Stated simply, Cornhusker neither asserts its own legal rights nor falls within the zone of interests protected by the regulation and constitutional right of privacy.

A. Statement of the Case

DSS agrees generally with Cornhusker's statement of the case. However, it should be noted that the trial court did not address the matter of parents Fourteenth Amendment rights, and thus that issue was not addressed by the Supreme Court of Nebraska. Further, it should be noted that there were no parents who were parties to the action.

B. Facts Material to Questions Presented

Cornhusker has set out facts which in general are material to the questions presented. DSS accepts Cornhusker's outline of material facts except the last sentence which is argumentative.

THE ISSUES CONSIDERED BY THE DISTRICT COURT DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

The decision of the Supreme Court of Nebraska was based on the statutory authority of the Department of Social Services to promulgate regulations for the care and protection of children. Cornhusker alleges that the Nebraska Supreme Court erred in not addressing the Cornhusker's Fourteenth Amendment due process right

to a fair hearing. This allegation ignores the fact that there was a full trial in the lower court and an appellate review in the Supreme Court. The fact that the court was able to dispose of the matter on statutory grounds would not result in a denial of due process where the alleged federal question is claimed by a facility that does not have standing to assert the claim. The Cornhusker Home is not the parent of the children, and in that position cannot claim the protection that is afforded to the family under the U.S. Constitution. Even if certain parents were parties to the action, which they are not, the fact remains that when parents place their children in the custody of a home or institution on a full time basis, the standard of state interest has changed. Thus, the state's interest in the protection of children must take precedence over an allegation of parental rights by an institution, which although possessed of some parental prerogatives by reason of the doctrine in *loco parentis,* is not in fact, the parent of the children. Thus, when the trial court and the Nebraska Supreme Court considered the validity of the regulation from the standpoint of statutory authority, and after a hearing on all the salient facts, decided on that issue, the Nebraska Supreme Court is not required to address unsubstantial federal claims. To refuse to do so is not a violation of the supremacy clause under Article VI of the United States Constitution nor is it a denial of the Fourteenth Amendment due process right to a fair hearing.

Cornhusker claims a protected parental liberty interest under the Fourteenth Amendment to the Constitution and alleges the questions are substantial. As stated above, the parents are not parties to the action and even if they were, they have, by placing the child in an institution,

given up certain parental rights are inherent in the traditional family situation. Further Cornhusker alleges a substantial independent claim to a liberty interest in its own right as a child caring agency. DSS submits that a prohibition of corporal punishment as a requirement for licensure, voluntarily entered into on a contractual basis, cannot be considered an intrusion sufficient to rise to a violation of the Fourteenth Amendment.

———o———

ARGUMENT

I.

CORNHUSKER, A CHILD CARING AGENCY, THE SOLE PLAINTIFF IN THIS ACTION DOES NOT HAVE STANDING TO CLAIM A DENIAL OF PARENTAL RIGHTS, INASMUCH AS STATE LICENSED CARE FACILITIES WHICH OFFER PUBLIC SERVICE, POSSESS NO CONSTITUTIONAL RIGHT OF PRIVACY.

None of the parents with children in the Cornhusker Home are plaintiffs in this action. Yet Cornhusker claims a protected parental liberty interest under the Fourteenth Amendment to the United States Constitution.

In its brief Cornhusker has equated the rights of parents with the rights of the operators of a home such as Cornhusker. The appellant cited *Smith v. Organization of Foster Families,* 431 U.S. 816, 839 (1977) for the proposition that a child caring agency such as Cornhusker through its house parents and the children in its care has the form and content as a healthy biological parent-child relationship. (See p.17 of Appellant's Brief). Even so *Foster*

Families, supra, considered but left unanswered whether a foster family is sufficiently akin to a natural family, to create a liberty interest triggering procedural due process before removal of a foster child from a foster home.

There is disagreement among courts and commentators as to whether parenting is itself a fundamental right. *Compare Baker v. Owen,* 395 F.Supp. 294 (M.D.N.C.) *aff'd,* 423 U.S. 907 (1975) *with Glaser v. Marietta,* 351 F.Supp. 555 (W.D.Pa. 1972). The United States Supreme Court has, however, recognized privacy as a fundamental right emanating from the penumbras of the constitution. One of the first privacy interests recognized by the Supreme Court was that of parents to raise and educate their children. *Meyer v. Nebraska,* 262 U.S. 390 (1923). In that case the Court declared that liberty included "the right of the individual to marry, establish a home, and bring up children." *Id.* at 399.

This raises the question as to whether the constitutional protection parents derive from the rights of privacy doctrine may be transferred to third parties. Notwithstanding deposition testimony to the contrary, representatives of Cornhusker testified at trial that during the past seven years, every parent placing a child with Cornhusker Christian Home has granted the home permission to use corporal punishment. Cornhusker's assertion overlooks a fundamental distinction. Although parents may delegate to third parties the power to make some child rearing decisions, such delegation does not carry with it that degree of constitutional protection which parents themselves enjoy.

In a case similar to the one at bar, operators of a private day care and preschool center challenged the con-

stitutionality of a California State Department of Social Services regulation which prohibited the use of corporal punishment in licensed day-care centers. *Johnson v. California State Department of Social Services,* 123 Cal.App. 3d 878, 177 Cal.Rptr. 49 (1981). The regulation, as set forth in § 31-239 of Title 22 of California's Administrative Code was as follows:

> (d) Discipline. Constructive methods must be used for maintaining group control and handling individual behavior.
>
> Corporal punishment and other humiliating or frightening techniques are prohibited.
>
> Punishment must not be associated with food, rest, isolation for illness or toilet training.

In an effort to obtain declaratory relief, the operators of the day-care center "vicariously assert[ed] the parents' alleged constitutional right to permit corporal punishment." 177 Cal.Rptr. at 37. The Court of Appeals, in upholding the constitutionality of the regulation stated:

> [W]e are here concerned with the delegation by the parents to third parties, and particularly state licensed care facilities of the rights of discipline by corporal punishment. We have been cited to no case which holds a State may not *by regulation* prohibit parents from either allowing or requiring others to administer corporal punishment to their children. *Parenting as a fundamental right is personal in nature.*

Id. at 53 (Emphasis added.)

The Court's analysis in *Johnson* is clear. Whatever protection parents derive from the right to privacy, may not be extended outside of the home to third parties.

State licensed care facilities possess no constitutional right of privacy, but rather, hold themselves out to provide a public service. Not only does the state have the power to oversee that children residing in state licensed care facilities are being properly cared for, but it has a duty to do so. DSS submits that in view of the above it is clear that a facility such as Cornhusker is not in the same position of parents and cannot therefore claim the same protected parental liberty interest.

This Court addressed the issue of standing in *Valley Forge College v. Americans United,* 454 U.S. 464 (1982), and commented on both the Article III requirements and prudential considerations. Based on that analysis of what Article III requires, for standing, one must show (1) that he has suffered actual or threatened injury, (2) that the injury can be traced to this action and, (3) that the injury is likely to be redressed by a favorable decision. *Id.* at 472. Cornhusker is unable to show actual or threatened injury apart from asserting the parents interests.

With respect to the prudential considerations, this Court has similarly stated that "the plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* at 474. Here the arguments of Cornhusker have a tenor of "speaking for the parents" when in fact it does not, and cannot because no parents are a party in interest. Furthermore, in *Valley Forge,* this Court required that the party's complaint must fall within the zone of interest to be protected by the law in question. *Id.* at 474. As Cornhusker argues for itself as a child caring agency, it must face the fact that a licensed agency does not inherit the same protection parents derive from the right of privacy.

In its brief on page 18 appellant alleges that the relationship between Cornhusker through its house parents and the children in its care has the same form and content as a healthy parent-child relationship. Cornhusker supports this proposition by citing *Smith v. Organization of* foster family. Cornhusker did not detail the holding of the case or supporting rationale. The District Court had avoided the question of whether the foster home is entitled to the same constitutional deference as the biological family, but this Court found that the challenged procedures (by involved foster parents and a foster parents organization) are constitutionally adequate even were it to be assumed that appellees (foster parents) have a protected "liberty interest." DSS submits that if foster families do not reach the threshold of a protected liberty interest, then it would certainly follow that a child caring agency does not reach that level. Foster families, as a general rule, are made up of a husband and wife, their children, and the foster child or children. There is usually a single family unit in a single family dwelling, and the husband and wife, to some degree act as substitute parents. However, in the child caring agency there are on the average twenty children who are supervised by staff so there cannot be the family atmosphere of the typical foster parent-child situation. It should be noted that there is no numerical limitation on how many children can be placed in a child care agency. Since this Court has not stated that a foster family has a protected parental liberty interest, DSS submits that logic would dictate that a child caring agency cannot be granted such protection because such an agency is even further removed from the true biological family situation than is, even the foster family.

Cornhusker cited several cases where this Court has considered a protected liberty interest in family relationships. In *Wisconsin v. Yoder,* 406 U.S. 205, 231-33 (1972) this Court held that the First and Fourteenth Amendments prevent the State from compelling parents of Amish children to attend formal high school to age 16. DSS does not believe that the right of Amish parents to decide on the course of education of their children under the First and Fourteenth Amendments is comparable to or determinative of the issue in this case, that is the right of the state to limit corporal punishment in a licensed home. Other cases cited by Cornhusker (See p.17 of brief) reiterate various protected fundamental rights, that is, the right to marry, the right to have children, the raising and educating of children, and living with relatives. DSS emphasizes that each of these cases address the rights of parents or of individuals in the family relationship and do not extend to substitute or surrogate parents or to child caring facilities.

Cornhusker claims that it has standing in this case to speak for the parent even though the parents are not party to the action. Several of the cases cited by Cornhusker are distinguishable from the case at bar. Cornhusker cites the *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974) which was a case where public school teachers challenged a mandatory maternity leave policy of five months before delivery of the child and three months afterwards. It was held that the rule was arbitrary and violative of due process because the rules create a conclusive presumption of incapability during the five months and the three month period. *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), held unconstitutional a state statute

which prohibited a minor (boy under 12 or girl under 18) from selling literature on the street or in public places. An aunt and custodian were charged with violation of the act for directing the child in the selling of religious oriented literature. It was held that the power of the state to control conduct of children is broader than its power over adults. It further held the statute not violative of freedom of religion nor denial of equal protection under the Fourteenth Amendment. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), held unconstitutional an Oregon statute to require all children to have instruction by public school teachers, thus prohibiting children from attending parochial schools. In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the State of Nebraska passed a statute which prohibited the teaching of any language other than English in the Nebraska schools. Other than restating that parents do have fundamental rights and are protected under the Fourteenth Amendment, DSS fails to see how those cases are determinative in any way in the instant case. Considered together those cases illustrate the legitimacy of state interest as well as to show the freedom of personal choice in family matters.

Pierce v. Society of Sisters, supra, is emphasized by Cornhusker to support its position that it can claim the Fourteenth Amendment rights of the natural parents. Essentially Cornhusker argues that it has standing to complain of the rule of DSS and its effect on the rights of the parents to care and discipline their children. Cornhusker alleges that it has standing to assert the concomitant rights of third parties who would be affected should the constitutional challenge fail. In *Pierce v. Society of Sisters, supra,* this Court did state that Society of Sisters could

assert the liberty interest of parents which the Fourteenth Amendment guarantees. However, it is necessary to note that the facts and issues in that case were clearly distinguishable from the case at bar. In the first place, the courts of the State of Oregon had not considered the constitutionality of the act. Secondly, the failure to address the issue would have required all students to attend public schools and would have effectively destroyed the Oregon system of private schools. In this case the Supreme Court of Nebraska has ruled on the matter and has made a decision based on independent and separate state grounds. In the instant case there was no such impact on an entire system. Rather, the evidence shows that only one facility is directly affected as this is not a class action and there are no parents joined in the action as plaintiffs.

Cornhusker cited *Craig v. Boren,* 429 U.S. 190, 195 (1976), in support of its theory that it can claim the rights of the parents. Cornhusker quoted from *Craig v. Boren* in its brief, when it stated that it is "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [the] constitutionality fail . . ." That quote from *Boren* should be examined in terms of its factual basis. In *Boren,* Craig, a male then under 21 years and Whitner, a license vendor of 3.2 beer, brought an action for declaratory and injunctive relief, claiming that an Oklahoma statutory scheme prohibiting the sale of nonintoxicating 3.2 beer to males under the age of 21 and to females under the age of 18 constituted gender based discrimination that denied males 18 to 21 of equal protection. In holding that the statute resulted in discrimination this Court addressed the standing of Whitner, the vendor, to advocate rights of third parties seeking to ac-

cess the market. This Court held that the vendor did have standing. However, it should be noted that *Boren* is distinguishable from the case at bar. Craig was a plaintiff when the action was brought, but the case was mooted when he turned 21, which was after this Court had noted probable jurisdiction. Craig, the minor and Whitner, the vendor were joint plaintiffs. The Court apparently reasoned that one should be able to continue to speak for the other since the case was at issue.

The cases cited by the Cornhusker to support standing are cases of extreme or unique situations. *Sisters,* involved the existence of the Oregon private school system. In *Boren, supra,* the vendor retained standing for the rights of the minor customer who had turned 21 and as a result had an interest that was moot. DSS submits that language from *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965) is appropriate to the issues in this case. Although in *Griswold* this Court held that a planned parenthood physician charged under a criminal statute had standing to assert the rights of married couples, it commented on and distinguished *Tileston v. Ulman,* 318 U.S. 44 (1943), which, DSS submits, is applicable to this case.

> *Tileston v. Ulman,* . . . is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought the requirements should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime.

Tiletson v. Ulman, supra, like the instant case was an action for declaratory relief and or an injunction against a statute prohibiting giving advice on contraception. This Court stated:

> . . . his patients are not parties to the proceedings and there is no basis on which we can say that he has standing to secure on adjudication of his patients constitutional right to life which they do not assert in their own behalf. (at 45).

In *Baker v. Owen, supra,* a District Court attempted to square *Meyer* and *Pierce* upon rejecting the claim that the parental right to discipline is fundamental: "In each case the parental right prevailed not because the Court termed it fundamental and the state's interest uncompelling, but because the Court considered the state's action to be arbitrary, without reasonable relation to an end and legitimately within its power." *Id.* at 299. DSS submits that the purpose of the regulation in question, which prohibits corporal punishment in the child care facility, serves a legitimate state purpose. Where child abuse in this country has reached epic proportions and numerous children placed in such facilities are themselves victims of physical abuse, exposure to an environment of corporal punishment reinforces the negative influence from which these children seek to escape. In light of these factors it is obvious that the state is *compelled* to take the necessary action to protect the physical and emotional well-being of children placed in child care facilities.

In view of the above, DSS submits that Cornhusker should not be permitted to attach its claim for protection of an alleged fundamental right on to the existing pro-

tected liberty interest of parents. Cornhusker has attempted to use a two-tier technique to "boot strap" its position as a child caring agency to the level of biological parents in the area of fundamental rights. Bringing its argument down to its basic rationale Cornhusker is stating: (1) that the liberty interest in family relationship is not determined solely by biological blood relationship and therefore, (2) that the protected rights of parents can be transferred to foster parents or to an even less familial environment such as a child caring agency. The Department of Social Services submits that logic would militate against such rationale.

II.

THE SUPREME COURT OF NEBRASKA ACTED PROPERLY IN DENYING CORNHUSKER'S MOTION TO CERTIFY A FEDERAL QUESTION SINCE THE CONSTITUTIONAL ISSUE WAS NOT ADDRESSED BY THE DISTRICT COURT AND WAS NOT THEREFORE, ASSIGNED AS ERROR BY THE APPEALING PARTY.

It is basic that an appellate court need not reach a decision on all errors assigned by the appealing party. The appellate court then certainly cannot address issues that were not reached by the lower court since particular issues were dispositive of the case. The appellate court cannot enlarge the scope of the trial courts findings.

DSS reiterates the statement made by the Supreme Court of Nebraska in its denial of certification of a federal question that Cornhusker did not cross appeal and could not cross appeal because the trial court did not have a specific finding adverse to Cornhusker. *Meyer v. First*

United Methodist Church, 206 Neb. 607, 294 N.W.2d 611 (1980).

Here the Supreme Court of Nebraska acted properly in addressing those issues brought by DSS in its assignments of error. The function of assignments of error is to set out issues presented on appeal. They serve to advise the appellee of questions submitted for determination in order that appellee may know what contentions must be met. *Coyle v. Janssen,* 212 Neb. 785, 326 N.W.2d 44 (1982); *Cooks v. Lowe,* 180 Neb. 39, 141 N.W.2d 430 (1966). Consideration of a case on appeal is limted to errors assigned and discussed. Supreme Court Rules, Rules of Procedure, Rule 9, subd. D(1)d. *State ex rel., Hilt Truck Line v. Jansen,* 218 Neb. 591, 357 N.W.2d 455 (1984). *Lincoln County Sheriff's Employees Assn., Local 546, International Brotherhood of Police Officers v. County of Lincoln,* 216 Neb. 274, 343 N.W.2d 735 (1984).

In the appeal from the trial court to the Supreme Court of Nebraska in the case at bar there were no assigned errors involving constitutional questions because the District Court had not decided the case on constitutional issues.

It is the general and well established rule that ordinances and statutes are presumed to be constitutional and that their unconstitutionality must be clearly established. *State of Nebraska v. John L. Chistin,* 209 Neb. 174, 306 N.W.2d 86 (1981). Courts will not pass on questions of constitutionality unless it becomes necessary to do so. *State of Nebraska, Appellee v. Fred T. Wenzel,* 215 Neb. 395, 338 N.W.2d 772 (1983); *Laverty v. Cochran,* 132 Neb. 118, 271 N.W. 354 (1936).

DSS submits that the Supreme Court of Nebraska was obligated to only address those errors which were assigned on appeal. The opinion of the court indicates that each was addressed. The Supreme Court of Nebraska did not have a duty to go beyond the scope of the opinion of the trial court, which did not address the constitutional issues.

III.

JURISDICTION DOES NOT REST WITH THE SUPREME COURT OF THE UNITED STATES SINCE THE OPINION OF THE SUPREME COURT OF NEBRASKA INDICATES CLEARLY AND EXPRESSLY THAT IT IS BASED ON BONA FIDE SEPARATE STATE GROUNDS.

The United States Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds. *Michigan v. Long,* 463 U.S. 1032 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). In *Michigan v. Long,* this Court held that it had jurisdiction against the assertion that the decision below rested on adequate and independent state grounds. This Court held that if the state-court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, independent state grounds this Court will not undertake to review the decision. *See also, Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931); *William v. Kaiser,* 323 U.S. 471 (1945).

A review of the opinion of the Supreme Court of Nebraska clearly shows that the decision was based on separate, adequate, independent state grounds. The opinion basically held that there was authority for the regulation prohibiting corporal punishment and that the regulation

was valid. A review of the opinion shows that the Supreme Court of Nebraska addressed all of the substantial issues addressed by the trial court. The appellate court disagreed with the trial court that public policy in Nebraska provided a child caring agency with an affirmative right to apply reasonable corporal punishment. The Court explained that Neb.Rev.Stat. § 28-1413 is a criminal defense provision of the Nebraska Criminal Code and does not create or confer an affirmative right to use corporal punishment. Further, the Court considered Neb.Rev.Stat. § 43-708 (Reissue 1984) which was cited by Cornhusker and explained that the statute restricted DSS from forcibly removing a child from the parent, guardian, or a person standing *in loco parentis* prior to any departmental or court authorized intervention but that it was not a basis for prohibition against corporal punishment. The Court also found that §§ 43-701 and 43-705,706 (Reissue 1984) which grant authority to the Department of Social Services to issue licenses and to investigate violations are compatible with the public policy of Nebraska. Neb.Rev.Stat. § 71-1904 (Reissue 1986) provides that the Department of Social Services shall make rules necessary for the care and protection of children was considered by the court. As to the authority of Department of Social Services to make such rules and regulations, the Court held that the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of statute. Thus, the Nebraska Supreme Court held that regulation 6-005.26K properly comes within Department of Social Services' rule-making authority to promulgate rules for the proper care and protection of children. The Court also held that it was not arbitrary

and capricious for Department of Social Services to prohibit corporal punishment in child caring agencies but to permit it in family day-care homes. This decision was reached after considering the various differences in the two environments. Children in foster care often come from abusive families while children in day-care centers are visited by their parents. Children in child caring agencies do not have this regular contact with their parents. Thus, the court found a rational basis for the disparity in the requirements.

Certainly the opinion of the Nebraska Supreme Court clearly and expressly set out the basis of its consideration and thus showed that it was based on separate and independent state grounds. In *Michigan v. Long, supra,* this Court reiterated the necessity of a "plain statement" that a decision rests upon adequate and independent state grounds. *Id.* at 1042. DSS submits that the opinion of the Nebraska Supreme Court in this case clearly provides that plain statement.

It is the position of the DSS that this Court will not take jurisdiction where it can determine whether the asserted non-federal ground independently and adequately supports the judgment. *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931); *William v. Kaiser,* 323 U.S. 471 (1945).

In *Michigan v. Long, supra* at 1213, this Court considered the problems of reviewing state decisions from the standpoint of accepting jurisdiction and clarified the standard of review.

> The process of examining state law is unsatisfactory because it requires us to interpret state laws

> with which we are generally unfamiliar, and which often, as in this case, have not been discussed by the parties. Vacation and continuance for clarification have also been unsatisfactory both because of the delay and decrease in efficiency of judicial administration.
>
> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been cornerstones of this courts refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds we, of course will not undertake to review the decisions.

Id. supra at 1213.

The opinion of the Supreme Court of Nebraska clearly fulfills the requirement of a "plain statement" in that it expressly and clearly describes the state grounds on which it was based. It is in no way obscure or ambiguous. It addressed each and all of the issues that were addressed by the lower court, and each and all of the errors that were assigned by DSS in its appeal.

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CONCLUSION

In view of the above this Court should not take jurisdiction of this appeal. DSS requests that the appeal be dismissed or affirmed under Rule 16(b) and (d) of the Rules of the United States Supreme Court.

Respectfully submitted,

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